9 October 1998

Original: English

Working Group established by General Assembly resolution 51/210 of 17 December 1996
28 September–9 October 1998

Statement by the International Committee of the Red Cross

The delegation of the International Committee of the Red Cross (ICRC) is very pleased to see you chair this Working Group once more. We are also very honoured to have been invited again to participate in this session and to take the floor today in our capacity as promoter and guardian of international humanitarian law.

We wish to take the floor at this stage of the discussion because the issue of the scope of application of the draft convention touches upon questions relating to humanitarian law. Allow therefore this delegation to take a few minutes of the time of this Working Group to make some remarks.

Let us start by stating that international humanitarian law cannot provide direct answers to most questions raised by terrorism, simply because it is not applicable outside armed conflict. It must be emphasized that situations of internal disturbances, tensions or riots are specifically ruled out of the applicability range of this body of law. Since sporadic acts of violence are not enough for humanitarian law to become applicable, acts of terrorism randomly directed at members of the public in countries at peace are not addressed by this law.

In the past decades, the need has been felt to draft instruments specifically aimed at the repression of acts of terrorism in peacetime. That is what we are doing today.

On the other hand, in situations of armed conflict, be they international or non-international, international humanitarian law has a clear answer to terrorism, in that it unconditionally prohibits terrorist acts and provides for their repression. Terrorist acts, insofar as they are grave breaches of the 1949 Geneva Conventions or of Protocol I, become universal crimes under the jurisdiction of all parties to these instruments. Indeed, each State Party is under an obligation to enact the necessary legislation to extend its criminal jurisdiction to any person who has committed a grave breach, regardless of the nationality of the perpetrator or that of the victim, or the location of the crime. Furthermore, States have

98-30047 (E)

formally undertaken either to prosecute or to extradite suspected war criminals under their jurisdiction – *aut dedere aut judicare*.[1]

It has been widely recognized that, in situations of armed conflict, humanitarian law is the *lex specialis*. Several treaties adopted under the auspices of the United Nations confirm this fact. The 1997 International Convention for the Suppression of Terrorist Bombings recognizes this in several ways:

Its article 19 (1) provides a general safeguard clause:[2]

> "Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law."

Paragraph 2 specifically states that the Convention should not be applicable in situations when the elaborate set of rules of humanitarian law are applicable:

> "The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are covered by other rules of international law, are not governed by this Convention."

The wording of this article leaves much to be desired.[3] The ICRC delegation, in its statement of 26 February 1998 before this Working Group, had proposed alternative wording for this clause, *inter alia*:

> "In situations of armed conflict, the parties to the conflict shall be bound by the rules of international humanitarian law, and this Convention shall therefore not apply".

This wording, which makes reference to a factual situation (i.e. an armed conflict), addresses the issue of the applicability of the draft Convention to acts by armed groups parties to a conflict in a more appropriate way than article 19 (2) of the 1997 Convention, which refers to "armed forces".

Let us stress once more that, in order for this clause to come into action, there must exist a situation of armed conflict, and the persons responsible for the incriminated acts must belong to a party to a conflict. This means, in particular, that terrorist acts committed in the context of an armed conflict by an individual or a group *not* party to the armed conflict would fall *within* the scope of applicability of the Convention on Nuclear Terrorism.

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[1] Art. 49 (2), Geneva Convention I, art. 50 (2), Geneva Convention II, art. 129 (2), Geneva Convention III, art. 146 (29), Geneva Convention IV, art. 85 (1) of Additional Protocol I.

[2] See also art. 16 of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, and art. 12 of the 1979 International Convention against the Taking of Hostages.

[3] It is understood from the negotiation of this clause that acts committed by the party to a non-international armed conflict other than a State, namely, an armed group, are excluded from the applicability of the 1997 Convention. ICRC believes, both because of the intrinsic logic of international humanitarian law and of its experience in promoting respect for humanitarian law in the midst of armed conflicts, that the same rules must be applicable to both opponents on the battlefield. Article 12 of the 1979 International Convention against the Taking of Hostages contains a similar provision: "Insofar as the Geneva Conventions of 1949 for the protection of war victims or the Protocols Additional to those Conventions are applicable to a particular act of hostage-taking, and, insofar as State Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of an armed conflict as defined ... [in international humanitarian law instruments]".

Let us make one last point about this exclusion clause. The last preambular paragraph of the 1997 Convention on Terrorist Bombings:

> "*Notes* that the activities of military forces of States are governed by rules of international law outside the framework of this convention and that the exclusion of certain actions from the coverage of this Convention does not condone or make lawful otherwise unlawful acts, or preclude prosecution under other laws".

This reference to international law obviously includes humanitarian law. ICRC welcomes in particular the second part of the sentence and expresses the hope that it will be incorporated into the Convention on Nuclear Terrorism. We want to point out, however, that this Convention deals with a subject matter that is quite different from that of the 1997 Convention: whereas the use of explosives in the conduct of hostilities can be considered as a classical means of waging war, this must be contrasted with the offences foreseen by article 1 *bis* of the draft Convention on Nuclear Terrorism.

The legality of the use of the nuclear bomb is a matter of some dispute. We have made our position known, and this is not the place nor the time to reopen this debate. However, a broad exception such as that provided for by the 1997 Convention, would include not only the nuclear bomb, but also other types of nuclear material. This may lead to the impression that what could be considered as new means of warfare is somehow legitimized, which of course is not the case.[4] In this connection, we can only be happy that such means have not been used so far. But one can easily imagine the effects they could have on human beings if used, namely, severe and permanent injuries for which there is no known medical treatment. Those means are also likely to cause superfluous injury and unnecessary suffering, as well as have indiscriminate effects. Finally, their long-term effect on the natural environment must be taken into account.

Therefore, the ICRC delegation suggests that States consider making clear, perhaps through a Chairman's statement or another medium, that the legitimization of new means of warfare is not intended by this Convention.

We realize the present statement is of considerable length, and thank the distinguished delegates for their attention regarding these important issues, which we feel must be addressed.

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[4] In this context, it is also useful tor recall article 36 of Protocol I additional to the 1949 Geneva Conventions, which states: "In the study, development, acquisition or adoption of a new weapon, means or methods of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstance, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party".